

**IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI**

**JENNIFER T FLECKENSTEIN
121 PRINCETON PLACE
DUBUQUE IA 52003**

**MARTIN LUTHER HOME CORPORATION
D/B/A LUTHER MANOR
3131 HILLCREST RD
DUBUQUE IA 52001**

**Appeal Number: 06A-UI-00644-RT
OC: 12-25-05 R: 04
Claimant: Appellant (1)**

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-1 – Voluntary Quitting
Section 96.5-2-a – Discharge for Misconduct
Section 96.4-3 – Required Findings (Able and Available for Work)

STATEMENT OF THE CASE:

The claimant, Jennifer T. Fleckenstein, filed a timely appeal from an unemployment insurance decision dated January 13, 2006, reference 01, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on February 2, 2006, with the claimant participating. Wava Terry, the claimant's grandmother, testified for the claimant. Troy Smith, Human Resources Director, participated in the hearing for the employer, Martin Luther Home Corporation, doing business as Luther Manor. Claimant's Exhibits A and B were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

On or about January 17, 2006, the administrative law judge received a request from the claimant for two subpoenas, Randy Fleckenstein, the claimant's husband, and Wava Terry. After several attempts to reach the claimant, the administrative law judge spoke to the claimant at 3:53 p.m. on January 23, 2006. He explained that he was not going to issue the claimant's subpoenas because she had not demonstrated that she had contacted the potential witnesses and they would not participate without a subpoena. Further, the administrative law judge was not convinced of the need for the testimony of the witnesses. The administrative law judge informed the claimant that he could recess the hearing and keep the record open for the issuance of a subpoena and then reconvene the hearing to take the testimony of the subpoenaed witness if that testimony was necessary. The claimant informed the administrative law judge that there was a no contact order in effect on the claimant prohibiting her from contacting Mr. Fleckenstein. The administrative law judge explained that he would not then be issuing a subpoena for Mr. Fleckenstein. Ms. Terry testified at the hearing for the claimant and the testimony of Mr. Fleckenstein was not necessary.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, including Claimant's Exhibits A and B, the administrative law judge finds: The claimant was employed by the employer as a full time certified nursing assistant (CNA) and certified medical aid (CMA) from December 31, 2002 until she separated from her employment on December 21, 2005. On that day the employer wrote a letter to the claimant as shown at Claimant's Exhibit A informing the claimant that because of her absences the employer was assuming that the claimant had resigned her position with the employer. The claimant received this letter on December 22, 2005.

On December 18, 2005, the claimant was arrested and incarcerated until the afternoon of December 22, 2005 for alleged domestic assault. As a result the claimant missed four full days of work, December 19, 20, 21, and 22, 2005. The claimant's husband, Randy Fleckenstein called the employer on December 19, 2005, and left a voicemail message for the employer's witness, Troy Smith, Human Resources Director. Mr. Fleckenstein left a message indicating that the claimant was incarcerated and she would not be at work and when she was released she would call the employer. This telephone call is confirmed at Claimant's Exhibit B. Neither Mr. Smith nor anyone else for the employer said anything to Mr. Fleckenstein or the claimant about the claimant's continued employment. As noted above, when the claimant was absent for two days the employer sent a letter to the claimant dated December 21, 2005, as shown at Claimant's Exhibit A. The claimant went to the employer's location on Friday December 23, 2005, to get her check. While there she asked Mr. Smith if it would be possible to reclaim her job and he indicated no and informed her that per the employer's policy she was considered to have resigned or quit.

Since the claimant's incarceration, the claimant has placed no physical restrictions or training restrictions on her ability to work. Since her incarceration, the claimant has placed no time or day or location restrictions on her availability for work. The claimant is earnestly and actively seeking work by making at least two in person job contacts each week and is maintaining a list of those contacts.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is ineligible to receive unemployment insurance benefits because, at relevant times, she was, and is, not able, available, and earnestly and actively seeking work. The claimant is not ineligible to receive unemployment insurance benefits for those reasons.

Iowa Code section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.25(4), (16) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(4) The claimant was absent for three days without giving notice to employer in violation of company rule.

(16) The claimant is deemed to have left if such claimant becomes incarcerated.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The first issue to be resolved is the character of the separation. The employer maintains that the claimant voluntarily left her employment when she was absent without herself notifying the employer for two days, December 19, and 20, 2005 in violation of the employer's policies pursuant to a letter sent to the claimant dated December 21, 2005. The claimant maintains that she was discharged by that same letter. The letter is shown at Claimant's Exhibit A. The evidence establishes that the claimant was actually absent at least four days, December 19, 20, 21, and 22, 2005. The claimant did not herself notify the employer. The employer has a policy that two consecutive absences as a no-call/no-show are treated as a quit. The administrative law judge concludes that the claimant was absent for four days in a row as a no-call/no-show without notifying the employer herself and this was a voluntary quit. It is true that the claimant's husband, Randy Fleckenstein, called the employer on December 19, 2005, and left a voicemail message at that time for the employer's witness, Troy Smith, Human Resources Director, informing him that the claimant was incarcerated and would not be at work and when she was released from jail she would call. However, this call was from the claimant's husband, and the claimant did not call at any time thereafter. Further, the message did not indicate when the claimant would be released. More compellingly, a claimant who becomes incarcerated is deemed to have left his or her employment voluntarily. The claimant was incarcerated from December 18, 2005 to December 22, 2005. There is no evidence that the employer indicated in any way to the claimant that her job was secure. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily effective on December 21, 2005. The issue then becomes whether the claimant left her employment without good cause attributable to the employer.

The administrative law judge concludes that the claimant has the burden to prove that she has left her employment with the employer herein with good cause attributable to the employer. See Iowa Code section 96.6-2. The administrative law judge concludes that the claimant has

failed to meet her burden of proof to demonstrate by a preponderance of the evidence that she left her employment with the employer herein with good cause attributable to the employer. The claimant was absent for a number of days because she was incarcerated for domestic assault. This incarceration was totally unrelated to her employment. Accordingly, the administrative law judge concludes that the claimant left her employment voluntarily on December 21, 2005, without good cause attributable to the employer and, as a consequence, she is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until, or unless, she requalifies for such benefits.

Even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism. The evidence establishes that the claimant was absent for at least four days because she was incarcerated which incarceration had nothing to do with her employer. The employer was only notified by a voicemail message from the claimant's husband and the voicemail message did not indicate when the claimant would be returning to work. Accordingly, the administrative law judge would conclude that these absences were not for reasonable cause or personal illness and not properly reported and were excessive unexcused absenteeism and disqualifying misconduct. Therefore, even should the claimant's separation be considered a discharge, the administrative law judge would conclude that the claimant was discharged for disqualifying misconduct, namely, excessive unexcused absenteeism, and she would still be disqualified to receive unemployment insurance benefits.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

The administrative law judge concludes that the claimant has the burden of proof to show that she is able, available, and earnestly and actively seeking work under Iowa Code section 96.4-3 or is otherwise excused. New Homestead v. Iowa Department of Job Service, 322 N.W.2d 269 (Iowa 1982). The administrative law judge concludes that the claimant has met her burden of proof to demonstrate by a preponderance of the evidence that at relevant times, she is, and was, able, available, and earnestly and actively seeking work. The claimant testified that she had placed no physical or training restrictions on her ability to work and that she had placed no time or day or location restrictions on her availability for work. The claimant further testified that she was earnestly and actively seeking work by making two in person job contacts each week and maintaining a list of such job contacts. Accordingly, the administrative law judge concludes that the claimant is, and was, at relevant times, able, available, and earnestly and actively seeking work and, as a consequence, she is not ineligible to receive unemployment insurance benefits for those reasons. However, as noted above, the administrative law judge concludes that the claimant is disqualified to receive unemployment insurance benefits because she left her employment voluntarily without good cause attributable to the employer.

DECISION:

The representative's decision of January 13, 2006, reference 01, is affirmed. The claimant, Jennifer T. Fleckenstein, is not entitled to receive unemployment insurance benefits until, or unless, she requalifies for such benefits, because she left her employment voluntarily without good cause attributable to the employer. The claimant is able, available, and earnestly and actively seeking work.

kkf/kjw